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proceedings. However, the process of contempt should never be resorted to as a first means but only when no other remedy would be effective.

(2) When the defaulting husband proves to the court that he is financially unable to comply with the decree directing the payment of alimony, the court may relieve him temporarily or reduce the amount ordered to be paid with the reserved power to review the revocation or modification order, and

(3) When any husband against whom a decree to pay alimony has been rendered, refuses to work if able, or refuses work when found or offered or who willfully conducts himself so as to be discharged from work for the purposes of avoiding the provisions of the decree, he shall upon conviction be guilty of a misdemeanor and punished by imprisonment for not more than six (6) months.

It will be noted that number (1) takes away from the court the power to imprison a defaulting husband for failure to pay alimony unless satisfied that the decree can be enforced by no other means or where the husband refuses to place himself in a position to be able to comply with the order. Number (2) makes it possible for an insolvent husband in good faith to temporarily escape the decree of alimony, subject, however, to liability upon becoming solvent. But, number (3) grants the court an additional power to prevent the husband from willfully remaining insolvent, thus assuring the wife of future alimony payments. It is believed that these limitations grant the court substantial remedies for enforcing their decrees and at the same time assure the wife of her alimony payments, saving the cooperative husband from a jail sentence and reducing the tax money spent for the operation of county jails.

JOHN W. MURPHY, JR.

THE DEGREE OF INTEREST NECESSARY TO DISQUALIFY A WITNESS UNDER THE DEAD MAN'S ACT

Soon after the enactment of the statute removing the general disqualification of witnesses by interest, almost every jurisdiction in the United States enacted a statute excluding testimony of a survivor of a transaction with a decedent when such testimony was offered against the latter's estate.¹ These statutes are commonly called "Dead Man's Acts." Kentucky is among that majority of jurisdictions which have such statutes in force today. Kentucky's "Dead Man's Act" is incorporated in section 606(2) of the Civil Code of Practice which also

¹ II WIGMORE, EVIDENCE, sec. 578 (1940).

provides that similar disqualification applies to a witness attempting to testify for himself as to transactions with infants under fourteen years and persons of unsound mind. Pertinent portions of the statute state:

"Subject to the provisions of subsection seven of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done . . . by one . . . dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living and of sound mind, and heard such statement, or was present when such transaction took place, or when such act was done or omitted, and except in actions for personal injury, death, or damage to property by negligent or tortious act, unless

"(c) The decedent, or a personal representative of, or someone interested in his estate, shall have testified against such person, with reference thereto,

"(d) An agent of the decedent . . ., with reference to such act or transaction, shall have testified against such person with reference thereto, or be living when such person offered to testify with reference thereto. . . ."

Subsection 7 provides: "The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another."²

The purpose of this and similar statutes is clear. They are intended

"... to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omissions, mistakes, or perhaps the falsehood of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf."³

It should be noted that the disqualification set out by the statute is not a general disqualification of the interested witness from testifying in an action pertaining to the decedent's estate, but only from testifying as to transactions with deceased in such an action. The court has held that it is without authority to extend this rule further than specifically authorized by the statutory provision.⁴

The most litigated question of construction arising from the statutory provision, and the question to which the remainder of this note will be limited, is the determination of the degree of interest in the litigation which the witness must possess to be testifying "for himself" and thus incompetent to testify under the terms of the statute.

² For cases interpreting this subsection see: *Bagby's Adm'r v. American Surety Company*, 161 Ky. 78, 170 S.W. 492 (1914); *Lenora National Bank v. Ragland*, 128 Ky. 548, 108 S.W. 854 (1908).

³ *Owens v. Owens' Adm'r*, 14 W. Va. 88, 95 (1878).

⁴ *Combs' Adm'r v. Vibbert*, 28 Ky. 463, 158 S.W. 2d 957 (1942).

Several other elements must be satisfied before it is necessary to determine whether the witness is incompetent because he is testifying "for himself." First, if the action in which the testimony is offered is one for personal injury, death or damage to property by negligent or tortious acts, such testimony is always competent. This exception is expressly defined within the statutory provision. Nor is such testimony incompetent in an action contesting the validity of a will on the grounds of undue influence or mental incapacity.⁵ Although this exception is not specifically set out in the statute, it is wholly within the purpose of the statute since such testimony in that action would not be against the deceased's interest but rather may be used as a safeguard in determining whether the will contested was the true intention of the testator. Furthermore, if the decedent, or a personal representative thereof, or someone interested in his estate has testified against the witness in regard to the transaction, the witness is also competent to testify thereto. This again is specifically excepted by the language of the statute. Finally, if there is a living person whose interest is adverse to that of the witness who was present when the transaction took place, the witness is competent to testify as to the transaction. This exception also is founded upon the wording of the statute.

The Kentucky Court has held that in order for a witness to testify "for himself," *i.e.*, to have such interest as would disqualify him by the terms of the statute, he must have a direct, pecuniary interest in the action.⁶ Accordingly, it must be evident

" . . . that he will either gain or lose by direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. His interest must be present, certain and vested, and not uncertain, remote or contingent."⁷

Although the rule is well defined, its practical application is not simple and may seem inconsistent on first impression in many instances.

Witnesses disqualified by the statute may be divided into three categories: first, those attempting to establish or invalidate a claim against the estate of the decedent; second, those who are related or affiliated with a person interested in the result of the litigation concerning decedent's estate; third, those who will receive compensation through benefit which may be derived by an interested party. Admittedly this categorization is somewhat arbitrary and may in certain

⁵ *Gay v. Gay*, 308 Ky. 539, 215 S.W. 2d 92 (1948).

⁶ *Arnold v. Arnold's Ex'r*, 237 S.W. 2d 58 (Ky. 1951).

⁷ *Keny's Adm'r v. Albright*, 291 Ky. 696, 698, 183 S.W. 2d 937 (1944).

instances overlap, but it may serve as a useful guide in applying the fundamental formula to particular situations.

I

The first class of witnesses to be considered is that group of persons attempting to establish or invalidate a claim against the debtor's estate—a claim which allegedly arose or gained its momentum from oral and private transactions with the decedent or was rescinded by such a transaction. A witness attempting to enforce such a claim may not testify insofar as the testimony relates to those transactions.⁸ On the other hand, recipients (heirs, legatees, devisees, etc.) of a portion of the deceased's estate are not competent as to transactions with the deceased and thus their testimony may not defeat such a claim.⁹ Certainly each of these witnesses has a direct pecuniary interest in the litigation in that its legal operation will either bestow upon them or deprive them of financial benefit. Comparable to this exclusion of testimony of a recipient of the estate is the exclusion of testimony of a beneficiary of a life insurance policy insofar as the testimony relates to transactions with deceased which would tend to strengthen grounds for recovery on the policy.¹⁰ However, a personal representative of a deceased person's estate is not incompetent to testify as to transactions with deceased merely because of his position as representative. He may testify unless he has an independent pecuniary interest in the estate.¹¹

II

The second class of witnesses to be considered consists of those related or affiliated with a person seeking to gain benefit from the

⁸ *Profitt v. Hardigan*, 306 Ky. 843, 209 S.W. 2d 496 (1948); *Duke's Adm'r v. Patton*, 264 Ky. 598, 95 S.W. 2d 249 (1936); *Owsley v. Bowles' Adm'r*, 124 Ky. 775, 99 S.W. 1157 (1907).

⁹ *Martin v. Martin*, 286 Ky. 408, 150 S.W. 2d 696 (1941); *McKnight's Adm'r v. McKnight*, 282 Ky. 522, 139 S.W. 2d 426 (1940); *Lawson's Adm'r v. Brandenburg*, 240 Ky. 68, 41 S.W. 2d 201 (1931); *Hopkins' Adm'r v. Faeber*, 86 Ky. 223, 5 S.W. 749 (1887). There is an exception to this general rule that a recipient of a portion of the estate of a deceased person may not testify concerning transactions with decedent, where the witness is bound by a fixed sum set out by a will, if the amount or certainty of this sum will not be altered by the judgment of the action in which the testimony is offered, *York's Ancillary Adm'r v. Bromley*, 286 Ky. 533, 151 S.W. 2d 28 (1941).

¹⁰ *Metropolitan Life Insurance Co. v. Trunick's Adm'r*, 246 Ky. 240, 54 S.W. 2d 917 (1932).

¹¹ *Wilson v. Jefferson Standard Life Insurance Co.*, 16 F. Supp. 200 (D. C. Ky. 1936); *Combs v. Roark's Adm'r*, 206 Ky. 454, 267 S.W. 210 (1924). The trustee of the estate of a bankrupt cannot testify as to transactions with deceased which are in the interest of the estate since the trustee stands in much the same position as the owner of the estate, *Morgan v. Moore's Ex'r*, 200 Ky. 684, 255 S.W. 540 (1923).

estate of the deceased. Recently, considerable litigation has involved the determination of the competency of the spouse of one directly interested in the outcome of the action. The court has held that the husband or wife of a person who will be benefited or defeated by the judgment is not competent as a witness as to transactions with deceased because he has an interest in the spouse's estate which is not a mere expectancy, but has already vested, and that interest brings him within the provisions of the act.¹² Although a husband or wife of an interested party is incompetent, a child is not,¹³ nor are brothers or sisters¹⁴ or parents.¹⁵ Although the child or parent of an interested party may ultimately share the benefit, he has no vested interest in the estate of his parent or child. This distinction aptly illustrates the degree of certainty which the interest must contain. In parallel with this distinction is the distinction between stockholders and agents or employees of persons or corporations which are parties or are directly interested in the outcome of the action. An agent or employee does not have such a vested interest in the financial gain or detriment of his principal or employer as to be disqualified from testifying.¹⁶ Even though he may be answerable to the principal or employer, he is not affected by the direct legal operation of the judgment. On the other hand, stock holders will ultimately share the pecuniary benefit or detriment which the judgment directly imposes on the corporation.¹⁷

III

The third class of witnesses involved consists of those who, although not related to a party or interested person in the sense of blood relationship or employment, will be compensated through the benefit which a party to the suit will receive if he prevails. In order for such a witness to come within the terms of the statute, this right to compensa-

¹² *Johnson's Adm'r v. Johnson*, 244 S.W. 2d 969 (Ky. 1951); *Denney's Adm'r Algright*, 298 Ky. 696, 183 S.W. 2d 937 (1944); *Truitt v. Truitt's Adm'r*, 290 Ky. 632, 162 S.W. 2d 31, (1942).

¹³ *Cruse v. Dunlap*, 301 Ky. 600, 192 S.W. 2d 475 (1945), *Hicks v. Oak's Adm'r*, 233 Ky. 27, 24 S.W. 2d 917 (1930).

¹⁴ *Fields' Adm'r v. Perry Co. State Bank*, 214 Ky. 24, 282 S.W. 555 (1926).

¹⁵ *Arnold v. Arnold's Ex'x*, 237 S.W. 2d 58 (Ky. 1951).

¹⁶ *Sachs v. Title Ins. & Trust Co.*, 305 Ky. 154, 202 S.W. 2d 384 (1947); *Bradley v. City of Harrodsburg*, 277 Ky. 254, 126 S.W. 2d 384 (1939); *Powers v. Gatliff Coal Co.*, 228 Ky. 5, 14 S.W. 2d 216 (1928).

¹⁷ *Brown, Bell & Cowgill v. Soper*, 287 Ky. 17, 152 S.W. 2d 278 (1941). A policy holder in a mutual insurance company is not disqualified by his interest as a policy holder in a suit against the company because his interest is remote and inconsequential, *New York Ins. Co. v. Johnson's Adm'r*, 24 Ky. Law Rep., 72 S.W. 762 (1903). Similarly a taxpayer is not disqualified in a suit against the Commonwealth for the same reason, *Hogg's Adm'r v. Commonwealth*, 301 Ky. 557, 192 S.W. 2d 487 (1946).

tion must be presently vested, legally enforceable¹⁸ and wholly dependent upon the recovery of the party. For example, an attorney whose fee is contingent upon recovery by his client is incompetent to testify as to transactions with a deceased person which are against the interest of the other party to the action,¹⁹ whereas if he has a right to a reasonable fee even though the other party may prevail, such testimony is admissible.²⁰ In an action by the best friend of a minor son against the executor of his deceased father's estate to enforce a contract whereby the father agreed to leave his entire estate to the son, the mother of the child was held to be competent to testify as to the transactions with the deceased concerning the contract. The court held that the parent must ordinarily provide support for a minor child if the parent is able to do so and thus the mother of the child would not legally benefit from the judgment since it would not relieve her of that duty.²¹ An undertaker, though he may be looking to the proceeds of a funeral benefit policy for compensation, may testify as to acts of the decedent, as his right to compensation is not dependent upon recovery but is absolute even in its absence.²²

In conclusion, the tests to be applied in determining whether the degree of interest of a witness is such as will render that testimony incompetent under section 606(2) of the Civil Code of Practice are: (1) The interest must be a pecuniary one (2) It must be present and vested (3) It must be one which will be affected by the direct legal operation of the judgment.

NORMA D. BOSTER

FEDERAL TAXATION: REGULATION THROUGH TAXATION— BOOKIE TAX

The recent enactment by Congress of the occupational tax on persons engaged in wagering¹ suggests the interesting question of whether the tax is a constitutional exercise of the taxing power conferred on Congress by Art. I, sec. 8 of the Constitution. The act im-

¹⁸ A witness who deceased had requested "be taken care of" out of a gift to a party to the action was held competent to testify as to acts of deceased because the witness never had an enforceable claim against the party and it would not become valid by legal operation of the judgment. *Trevathan's Ex'r v. Dee's Ex'rs*, 221 Ky. 396, 298 S.W. 975 (1927).

¹⁹ *Smick's Adm'r v. Beswick's Adm'r*, 113 Ky. 439, 68 S.W. 439 (1902).

²⁰ *Haydon v. Easter*, 15 Ky. Law Rep. 597, 24 S.W. 626 (1894).

²¹ *Arnold v. Arnold's Ex'r*, 237 S.W. 2d 58 (Ky. 1951).

²² *Corbin Council No. 80, Junior Order, United American Mechanics v. Partin*, 307 Ky. 827, 212 S.W. 2d 212 (1948).

¹ 26 U.S.C.A., 3285-3291 (1951).